

# Appellate Litigation Clinic

This clinic allows 12 students to engage in the hands-on practice of appellate litigation through actual cases before various federal circuit courts of appeals. The students are teamed up and assigned to handle primary responsibility for briefing at least one appellate case during the course of the year. They also work together as a small law firm to help each other. Our hope is that many will have the opportunity to argue cases themselves.

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The Appellate Litigation Clinic is a full-year clinic, with 4 ungraded credits in the Fall semester and four graded credits in the Spring. Because we work on real cases, the law student practice rules of the Virginia Bar and the various federal circuits require us to limit the clinic to Third-Year students who have taken (or will have taken by the end of 3L Fall Semester) Professional Responsibility and Evidence, in addition to 1L Criminal Law and Civil Procedure.

Ideally, the aspiration is that we will take on six cases in the federal courts of appeals over the course of the year, brief them working in teams, and then divide the arguments in half (opening and rebuttal) so that everyone gets to participate in oral argument at some point. Along the way we might have some other experiences—like a certiorari petition in a case we have lost, or an amicus brief in some other case that presents interesting issues—depending on our capacity and your interests, and how things develop. We will, I hope, function very much like a small, highly collegial and excellent law firm.

Of course real litigation simply cannot be stage-managed like a classroom experience, so we may fall short of those aspirations. We depend, for our cases, on the pro bono appointment processes of a handful of federal courts of appeals. Our cases will appear when they appear, and they will develop in unpredictable ways. Our busy times may be early in the year, or late. We may not have as many cases or as much choice as we would like. Some of you may not get argument opportunities, or may have to argue a case held over from the prior year. Arguments and the crunch time for briefing may arrive at inconvenient times. My objective is that this will be a lot of fun and not too burdensome—but exactly how much work we have to do, and when, will vary depending on the twists and turns of litigation and how hard the issues turn out to be, substantively. None of that can

be predicted in advance, and our professional obligation will be to do excellent work for our clients even if it turns out to be harder than we hoped.

The cases we have briefed this year illustrate the sort of matters we are most likely to take on.

- *Wright v. Clarke*, No. 19-7447 (4th Cir.), is a habeas case for a Virginia prisoner who has served nearly 10 years in prison for shoplifting beer and a sandwich from a convenience store because his attorney agreed to instructions on an uncharged crime without doing the minimal research necessary to discover that grand larceny from the person is not (as the prosecution wrongly represented) a lesser included offense of the charged crime of robbery (for which he was acquitted).
- *Muhammad v. Superintendent*, No. 19-1905 (3rd Circuit), is about whether our client is entitled to a new trial because the instructions wrongly suggested to the jury that it could convict him of attempted murder if an accomplice or co-conspirator had specific intent to kill.
- *Firewalker-Fields v. Lee*, No. 19-7497 (4th Cir.), is a § 1983 suit alleging that the Middle River Regional Jail in Staunton violates both the Establishment and Free Exercise Clauses by broadcasting a Christian worship service to the “day rooms” in every cell block during lockdown hours on Sundays, while making no provision for Muslim inmates to participate in Jumuah prayers on Fridays.
- *Zamichieli v. Pennsylvania Dept. of Corrections*, No. 19-3305 (3d Cir.), is a § 1983, Americans with Disabilities Act, and Rehabilitation Act case for a prisoner with a known seizure disorder, who suffered significant injuries when he fell down stairs after being wrongly assigned to an upper tier cell. He also alleges that prison officials retaliated against him for filing grievances, in violation of the First Amendment.

This year’s students also argued four cases that were holdovers from last year’s clinic:

- *Willie Dean v. Johnnie Jones, et al.*, No. 18-7227 (4th Circuit), was an Eighth Amendment excessive force claim by a North Carolina prisoner against correctional officers who shoved him into a broom closet and beat him for more than a minute. The issue is whether the district court erred in

granting summary judgment for the officers on the crucial question of whether their intent was to restrain him or to punish him. We won.

- *Scott Tyree v. United States*, No. 18-7392 (4th Circuit), was a Federal Tort Claims Act suit by an inmate who was assaulted by his cell mate for more than 10 minutes before officers responded to his emergency alarm. The issue was whether the officers' delay in responding is sheltered from suit by the "discretionary function" exception to the United States' waiver of sovereign immunity. We won that one too.
- *United States v. John Simer*, No. 19-3784 (6th Circuit), was a direct criminal appeal for a defendant who was sentenced to 55 years in prison for a single count of selling a small amount of heroin, on the basis that its use led to a fatal overdose. The principal issues were whether the government proved that he sold the (carfentanil-contaminated) substance that led to the death, whether the statute requires proof that he knew he sold that substance, and whether a secretly recorded interview should have been suppressed because he had invoked his right to counsel. We lost the other issues, but the 6th Circuit panel chose not to reach the suppression issue and reserved it for collateral review. I am still hopeful that John will ultimately win on that ground, which was by far the strongest.
- *Timothy Ward v. Lester Smith*, No. 19-13520 (11th Circuit), is a case under the Religious Land Use and Institutional Persons Act, concerning whether a Muslim inmate in Georgia is entitled to grow an untrimmed beard as his religious beliefs dictate. This one was argued by one of our students in December. We are awaiting a decision, and optimistic.

I am happy to share the briefs we filed in any or all of these cases if you are interested in seeing the (excellent) work that we do.

My name is Scott Ballenger, and I am the director of the clinic. I am a double-Hoo (CLAS 93, LAW 96) and joined the Law School faculty in the 2019-2020 school year after 20 years as an associate and then a partner in the Supreme Court and Appellate group at Latham & Watkins LLP in Washington. In private practice I was individually recommended by Chambers in the National Appellate category and argued dozens of cases in the courts of appeals and two in the Supreme Court. I have a lot of experience working on appellate matters at the very highest levels, and will be deeply involved with you on these cases every step of the way. I expect this clinic experience to have a lot in common with working as a junior associate in

an elite firm appellate practice—except that you will have even more personal responsibility, and are much more likely to get stand up argument experience. Please feel free to reach out with questions. I am at sballenger@law.virginia.edu or 202-701-4925.

The clinic is limited to 12 students, and selection will be by lottery. In the past that lottery was just part of the summer course selection process, but I have moved it earlier so that we can get started on our cases a bit earlier, and so that next year's clinic members can give their input into case selection and other decisions that may need to be made over the summer. Seeking out cases in August and September often results in briefing schedules stretching out later in the academic year than we like, particularly in direct appeal criminal cases where it is necessary to order transcripts. Getting started earlier gives us access to a larger pool of potential cases, more flexibility in how we arrange the briefing schedules, and better odds that oral arguments can be scheduled before the end of the year. But it also means there may be some work that needs to be done over the summer. My aspiration is that any summer work will be modest and voluntary, and if you are unable to help I won't hold it against you and it certainly won't affect your grade. I understand that you will have other commitments, and I am here to help with anything and everything. I do think, however, that getting a jump start on selecting and starting on our cases before the fall semester begins could make the whole process easier and more enjoyable over the course of the year.

If you would like to enter the lottery, please email Jason Dugas, [jdugas@law.virginia.edu](mailto:jdugas@law.virginia.edu), by **April 24, 2021**.